Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, et al.,

Petitioners,

v.

DOW CORNING CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are individual claimants who have exercised their right to opt out of a settlement plan approved by the multidistrict litigation district court to which the silicon gel-breast-implant products liability litigation was assigned for pre-trial proceedings. During the MDL proceedings, the court established a Plaintiffs' Litigation Expense Fund and provided for its funding by a system of assessments. Petitioners seek to appeal from an MDL order that imposes an assessment of six percent on monetary recoveries obtained by class members who have opted out of the settlement. The court of appeals dismissed the appeal on the ground that the assessment order was not a final order.

The question presented is whether, contrary to the ruling of the court below, the assessment order, as it applies to women who have opted out of the settlement, is a final order under the Collateral Order Doctrine of *Cohen v. Beneficial Industrial Loan Corporation.*

LIST OF PARTIES

Pursuant to Rule 14(b) Petitioners Carol Ingle, Barbara Brennan, Carolyn Juanita Facundus, Ann Margaret Huff, Chloe Acuff, Deborah Vanetten and Rosalee Mouzon submit this list of parties pursuant to Supreme Court Rule 14(b). Tens of thousands of persons are potentially interested in this appeal and its outcome. Given the scope of this litigation, combined with its continuously changing character, it is very difficult to identify and list all interested persons. This List identifies the parties represented by the undersigned law firm in this appeal, as well as attorneys and other persons or businesses of whom the appellants are aware have an interest in the outcome of this appeal.

Baxter Healthcare Corp.

Baxter International, Inc.

Bristol-Myers Squibb Co.

Inamed Corp.

McGhan Medical (California Corp.)

McGhan Medical Corp. (Delaware Corp.) a/k/a McGhan Medical/3M

Medical Engineering Corp.

Minnesota Mining & Manufacturing Co. a/k/a 3M Company

Union Carbide Chemical & Plastics Co.

Union Carbide Corp.

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Bristol-Myers Squibb, Surgitek:

Richard Eittreim – McCarter & English

Corning, Inc.:

William D. Eggers – Nixon, Hargrave, Devans & Doyle

Dow Chemical:

Herbert L. Zarov – Mayer, Brown & Platt

Dow Corning Defendants:

Frank C. Woodside, III – Dinsmore & Shohl

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Carolyn H. Williams – Williams & Connolly

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L. Richard Rawls – Palmierei, Tyler, Wiener, Wilhelm & Waldron

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Mentor Corporation:

William B. Griffin – Brobeck, Phelger & Harrison

'21' International Holdings, Inc./Scotfoam:

Carl A. Henlein – Brown, Todd & Heyburn

Union Carbide Corp./Chemicals:

John Dames – Kelley, Drye & Warren

3M:

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Petrarch Systems, Inc. Huls America, Inc.:

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit dismissing petitioners' appeal.

ORDERS BELOW

The order of the district court, together with the relevant portions of related orders, is set forth in the Appendix, pages 1-7.[1] The order of the court of appeals dismissing petitioners' appeal is set forth at App. 10. The court of appeals' order denying rehearing is set forth at App. 8-9.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on October 6, 1998. The order of the court denying rehearing was entered on December 4, 1998.

[1] Complete copies of these orders are being provided to the Court as a separate Lodging rather than as part of the Appendix as the bulk of the issues covered therein are irrelevant to this appeal.

STATUTE INVOLVED

28 U.S.C. § 1291 provides in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

STATEMENT

Petitioners seek review of the court of appeals decision holding that the order from which they appealed was non-final and hence unreviewable under 28 U.S.C. § 1291 (1998).

Petitioners are members of a class of women (the "Lindsey class") who received silicon gel breast implants. A class action on their behalf was part of multidistrict pre-trial product-liability proceedings assigned by the Judicial Panel on Multidistrict Litigation to Chief Judge Pointer of the Northern District of Alabama in 1992.[2] Petitioners have opted out of a class settlement arrived at in the multidistrict proceedings. They seek to challenge a provision of an order of the MDL court that, despite their opting out of the class settlement, imposes on them an assessment of six percent of any amounts they might recover from the breast implant defendants by way of settlement or litigation of their individual claims.

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[2] Petitioners Carol Ingle and Barbara Brennan are named plaintiffs whose cases were transferred to the MDL court. Petitioners Carolyn Facundus, Ann Margaret Huff, Barbara Mack-Gant, and Rosalee Mouzon are absent class members.

The MDL court first addressed the matter of assessments in its Order No. 13, entered July 23, 1993. That order established a Litigation Expense Fund designed to provide for the "fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation." The fund was to be fed through assessment of a percent of the "gross monetary recovery" of plaintiffs who "settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including both compensatory and punitive damages, with respect to a breast implant claim."

The initial assessment order (fixed at five percent of the gross monetary recovery obtained prior to November 1, 1993, and six percent thereafter) applied to all breast implant cases "now pending, or later filed, transferred to, or removed to" the MDL court, to "other federal breast implant cases which are not transferred to this court under MDL 926, but in which plaintiff's counsel agrees to this obligation," and to "cases in a state court to the extent so ordered by the presiding judge of that court." Assessments were to be withheld by the defendant or defendants and to be paid into the fund.

In September, 1994, after notice to class members and opportunity to object or opt out, the MDL court approved a so-called "global settlement" providing for settlement of claims out of a fund of $4.2 billion over the course of thirty years. The settlement provided that if claims exceeded the amounts reserved to pay them, benefits would be subject to reduction and class members would

be afforded an additional opportunity to opt out of the settlement. The response to the global settlement in fact overwhelmed the reserves. In addition, Dow Corning, the largest contributor to the settlement, filed a voluntary petition for reorganization in bankruptcy.

Following a breakdown of the initial global settlement, the court invited further consideration. Thereafter, in an order entered on December 22, 1995 (Order No. 27), a substantially revised settlement plan was approved.[3] It provided once more for an opt-out period.

Order No. 27 addressed again the matter of assessments for the benefit of the Litigation Expense Fund. With regard to amounts paid to settlement participants pursuant to the settlement, defendants were assessed a surcharge of six percent to be paid into the Fund. This surcharge would not reduce the scheduled amounts payable to plaintiffs participating in the settlement. With regard to women not participating in the settlement, a notice attached to Order No. 27 states:

> Order No. 13 continues in place, and will continue to govern the resolution, whether by trial or settlement, of breast-implant claims of persons who do not accept (or are not eligible to participate in) the revised settlement, but who either were members of the *Lindsey* class (and did not exercise their initial right to opt out) or, although not members of the Lindsey class (whether because they were ineligible or

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[3] The revised settlement (RSP) does not involve all of the manufacturers who were subject to the earlier settlement plan; not all of the class members eligible for the global settlement are eligible for the RSP; the benefits provided are substantially less.

> because they exercised their initial right to opt out) now or in the future have breast-implant claims that are filed in or properly removed to federal court. What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund.

In response to Order No. 27, petitioners chose to opt out of the revised settlement. After they did so, the MDL court issued its last assessment order, dated March 26, 1996 (Order No. 30). Order No. 30 made clear that the six percent assessment was intended to reduce the recoveries of persons who, like petitioners, "did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right."[4]

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[4] The full text of Order No. 30, as it applies to the Litigation Expense Fund, is as follows:

> Common Benefit Fund. Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 27, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such as opt-out right.

During the pendency of the appeal, the court below, *sua sponte*, raised the question whether Order No. 30 was final and appealable. Following briefing and oral argument, the court answered that question in the negative and ordered the appeal dismissed. It subsequently denied a petition for rehearing.[5]

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[5] Apart from claiming that Order No. 30 was interlocutory, the corporate respondents argued in the court below that, so far as assessments are concerned, Order No. 30 simply repeated the terms of Order No. 27. On this premise, they suggest that, on petitioners' own theory that the MDL court's assessment is reviewable on appeal, petitioner should have sought review of Order No. 27. The failure to do so, they assert, makes their appeal untimely under the Rules of Appellate Procedure.

The premise is erroneous. The relevant provision of Order No. 30 is not merely an historic recital of what has gone before. Thus, the initial assessment order, No. 13, it will be noted, carefully excepted recoveries in state court unless ordered by that court. Order No. 27 said that Order No. 13 "continues in place" and concludes by stating that this means that opt-out claimants will be subject to a six percent levy on gross monetary recovery. It makes no reference to state claims and it expresses no purpose to override the explicit exclusion of state claims set forth in Order No. 13, which "continues in place." Order No. 30 makes a change that has wide impact; it expressly covers, for the first time, recoveries in state court. Moreover, Order No. 30 states that "[T]his order supplements – and, in the event of inconsistency – supersedes prior orders . . . and applies to all breast implant cases that are now pending in or may later be filed in, removed to, or transferred to this Court."

Neither the district court nor the court of appeals accepted the claim of untimeliness. In extending petitioners' time for appealing from Order No. 30, Chief Judge Pointer expressed reservations as to finality, none as to timeliness. The court below simply held that order "not final."

REASONS FOR GRANTING THE WRIT

This case, like last Term's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), raises important and unresolved jurisdictional and procedural issues that arise from orders of the Judicial Panel on Multidistrict Litigation transferring civil actions involving common questions of fact to a multidistrict court for pre-trial proceedings. *See* 28 U.S.C. § 1407 (1998). In 1992, the Panel transferred all pending federal product liability actions arising from women's use of silicon gel breast implants to the Northern District of Alabama for consolidated MDL pre-trial proceedings. A class action settlement was ultimately arrived at during those proceedings. That settlement, which included a schedule of maximum payable benefits for various types of injury, permitted women who claimed harm from breast implants to opt out of the settlement in order to pursue individual actions or claims for amounts greater than those provided in the class settlement.

Petitioners are among the many hundreds of women who have chosen to exercise their right to opt out of the class settlement in order to pursue their individual claims. Despite their exercise of this opt-out right, the MDL court has imposed, for the benefit of class action counsel, an assessment of six percent of any amounts they individually recover from defendants. Unlike the similar assessment on recoveries by women who have remained in the class and have accepted the class settlement – an assessment which is to be paid by defendants in addition to the recoveries prescribed in the settlement, and which consequently does not reduce settling plaintiffs' recoveries – the assessment on those who opt out is

to be *deducted* from the amount of their recoveries and paid, instead, to class counsel. Millions of dollars have already been deducted from the recoveries of women who have opted out of the settlement; the amounts increase almost daily.

Petitioners seek review of the MDL court's assessment order directed against their individual recoveries. The court of appeals, however, has dismissed their appeal, holding that the MDL court's assessment "is not a final appealable order" and rejecting, *sub silentio*, petitioners' alternative suggestions that the MDL order be treated as an appealable injunction or that the court of appeals review the order through the exercise of its mandamus jurisdiction.[6]

In refusing to review the MDL court's assessment order, the court of appeals did not suggest when, if ever, petitioners might secure effective appellate review. In similar circumstances, the court of appeals for the Fourth Circuit has granted immediate review of an MDL court's assessment order in order to resolve "[a] serious question . . . about the power of a district court overseeing multidistrict litigation to enter an order reaching nonparties and affecting state court proceedings," especially in light of the "purported applicability [of the assessment] to hundreds of litigants and claimants." *In re Showa Denko K.K. L-Tryptophan Products Liability Litigation-II*, 953 F.2d 162 (4th Cir. 1992). This Court should grant the petition

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[6] For the reasons stated below, we believe that the MDL order has all of the requisites of finality. Accordingly, we do not think it necessary to elaborate here upon the possibility of extraordinary relief.

for certiorari in order to vindicate petitioners' right to secure appellate review of the MDL court's assessment order and to resolve existing uncertainty and confusion about the correct and most appropriate means of review of such orders.

1. It is undisputed that petitioners have a right to meaningful appellate review of the MDL court's decision to impose an assessment of six percent on any amounts petitioners recover from breast-implant defendants through state or federal litigation or out-of-court settlements. The MDL court has ordered defendants to deduct the six percent assessment from any such recoveries and to pay the same into a fund that is to be used to compensate class-action counsel for their efforts in achieving a settlement from which petitioners have exercised their right to opt out and thus will obtain no benefit. The assessment order thus reduces the recoveries to which petitioners would otherwise be entitled without giving petitioners any opportunity to challenge the order by refusing to obey it. Moreover, since the order requires defendants, not petitioners, to pay part of petitioners' recoveries into the Litigation Expense Fund, it is apparent that the defendants, who remain subject to the MDL court's jurisdiction pursuant to the class settlement, have every incentive – and no disincentive – to make those payments.

If petitioners' cases and claims remained subject to the jurisdiction of the MDL court, that court's assessment order would properly be deemed to be a non-final order for two basic reasons – the MDL court might, in the future, modify or withdraw the order prior to its having any impact on petitioners and, even if the order remained

in place, petitioners would have an opportunity to include a challenge to it in any appeals from final monetary judgments in their favor. In this case, however, neither of these reasons is applicable. Pre-trial proceedings having been completed in the MDL court, opt-out petitioners who have already instituted breast-implant litigation against defendants will have their cases transferred back to other federal or to state courts. *See Lexecon, supra.* Those transferor courts will not be free to revise or reconsider the MDL court's assessment order as they would if it had been entered in litigation that had not been transferred to the MDL court, but had always remained in the transferor court. Thus, the Federal Judicial Center's Manual for Complex Litigation (3rd) (West 1995), notes that while "the transferor court has the power to vacate or modify rulings made by the transferee [MDL] court, subject to comity and 'law of the case' considerations, doing so in the absence of a significant change of circumstances would frustrate the purpose of centralized pretrial proceedings." Pp. 255-256.

For petitioners who do not institute formal litigation, but who settle their breast-implant claims with defendants out of court, the procedural situation is even worse.[7] In order to seek revision of the MDL court's assessment order, these non-litigating petitioners would be obliged, despite their desire to settle out of court, to institute actions against the defendants with whom they have settled. It is doubtful whether any court would even

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[7] Many of the women who were members of the Lindsey class have chosen to negotiate with defendants in advance of filing a complaint.

consider such an original collateral attack on the MDL court's assessment order; even if it did, it would surely believe it appropriate to give at least as much deference to the MDL court as is appropriate for a transferor court to whom a case is returned after pre-trial MDL proceedings. Where an assessment order directed to defendants is concerned, such deference would, indeed, seem especially called for. If a trial court other than the MDL court, with jurisdiction over one or more of the defendants, were to revise or countermand the MDL court's assessment order, those defendants would find themselves faced with directly conflicting mandates by different trial courts, sitting, at least at times, in different circuits.

Moreover, opt-out petitioners subject to the MDL court's assessment order will have no effective route of appeal from that order if forced to await a judgment or settlement before seeking redress. Unless a judgment is obtained in a district court within the Eleventh Circuit, any federal or state court hearing an appeal from a lower court decision adhering to the assessment order will be in the position of reviewing a court (the MDL court) over which it has no appellate jurisdiction, a process potentially leading to irreconcilably conflicting directions to the defendants. Separate appeals of the assessment order in federal circuits throughout the country also raises the disturbing specter of conflicting appellate judgments regarding the validity of the same trial court decision. Considerations of comity and judicial efficiency call strongly for the recognition of a single appellate forum as the appropriate site of review of the MDL court's assessment order; unquestionably, that forum should be the court of appeals with appellate jurisdiction over the MDL

district court – in this case the Court of Appeals for the Eleventh Circuit.

2. The collateral order doctrine announced by the Court in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), provides a solution to these problems. The court recognized in *Cohen* that Congress' conferral, in 28 U.S.C. § 1291, of jurisdiction on the courts of appeals to review "final decisions of the district courts" should be given a "practical rather than a technical construction." 337 U.S. at 546. Under *Cohen*, a technically non-final order, i.e., an order entered "before (perhaps long before) [a] case has ended" is nevertheless appealable as a "final decision" under § 1291 if it "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The collateral order doctrine "qualif[ies] for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak." *Johnson*, 515 U.S. at 311. The doctrine seems especially designed for dealing with the review of certain class-wide orders entered by an MDL district court to which numerous cases from districts throughout the United States are transferred for pre-trial proceedings by the Judicial Panel on Multidistrict Litigation. When the MDL court ends the consolidated pre-trial phase of these cases, it must transfer those that have not been settled or

dismissed back to the transferor courts in which they originated. *Lexecon*, 523 U.S. at 72. When the pre-trial phase ends, the MDL court has rendered its final decision on the matters entrusted to it by the Multidistrict Panel assignment. As the Federal Judicial Center's Manual for Complex Litigation indicates, reconsideration of these matters by transferor courts (or, *a fortiori*, by courts in which the MDL court's orders might be collaterally attacked) "would frustrate the purposes of centralized pretrial proceedings." *Id.* at 256. *See also* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978). If the MDL court's decision is thus to be, for all practical purposes, the final district court determination of the matter, it makes eminent sense for that decision to be reviewable at the end of the pre-trial stage and for that review to take place in the single court of appeals with jurisdiction over the MDL court. This is particularly true where, as in the case of an assessment order like that in this litigation, immediate review of the MDL court's final determination of the matter will not delay trial court proceedings or settlement discussions on behalf of women who have opted out of the class settlement. *See Johnson*, 515 U.S. at 311.

The three-part *Cohen* test for collateral final orders clearly applies to the circumstances of this case. The MDL court's six percent assessment on recoveries achieved outside the class settlement was plainly intended by that court to be a conclusive determination of the obligation of opt-out plaintiffs. If it were not so treated by other courts and the defendants, the result would be a serious interference with the funding of the Litigation Expense Fund

set up to compensate class counsel (who will not be counsel in or involved in the various actions and settlements to which the assessment order is meant to apply). The validity and size of the assessment are matters completely separate from the merits of breast-implant claims and litigation and, as we have described above, no effective appellate review of the assessment order will be possible if the MDL court's final determination of that matter is not promptly reviewable in the circuit in which the MDL court is located.

3. Confining itself to the issue of finality, the court below had no occasion to reach the merits. We note briefly that the questions yet to be decided are substantial. If this cause is remanded, the court of appeals will be called upon to consider the appropriate limits upon the power and discretion of a multidistrict litigation court to impose charges upon those members of a plaintiff class who opt out of a class settlement in order to pursue their separate remedies by negotiation or by suit in other fora. This involves, in turn, a number of subsidiary questions.

Is it appropriate to impose the same levy upon those who accept the settlement approved by the MDL court and those who proceed independently, given that the latter will be heavily dependent upon their local counsel to establish the critical elements requisite to a recovery? Is it permissible to impose a uniform levy of six percent of any recovery without regard to individual circumstances, in particular, the fact that many of the opt-outs were unnamed class members only passively and peripherally involved in the proceedings conducted by the MDL court? Was the district court obligated, in all events, to hold a hearing with respect to the provision of its Order

No. 30 that imposed the six percent assessment on those who opted out?[8]

We would point out further that any modification of the district court's order of assessment that might ultimately result from a remand of this cause and a decision favorable to these petitioners would affect as well the rights of those hundreds of similarly situated claimants who have been assessed six percent of their respective recoveries from the corporate defendants. In accordance with an order of the district court setting procedures for collection of those assessments, the defendants, to our knowledge, have thus far withheld more than seven million dollars and deposited the same in designated escrow accounts.

4. Mass tort litigation creates its own set of problems with respect to the sharing of litigation expenses and counsel fees. Those problems tend to be especially complex in the context of multidistrict litigation. Typically, in such cases, committees of counsel are formed to serve a wide range of pre-trial functions on behalf of group members whose interests and positions are in various particulars dissimilar. The proceedings, moreover, are fluid; membership is constantly in flux. Not surprisingly, measures to assess contributions take various forms and shapes. As stated in the Manual for Complex Litigation, p. 29, the MDL judge "has the authority

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[8] While the court did hold a hearing, three years earlier, when it first dealt with assessment in its Order No. 13, that order was much more limited in its reach. *See* ¶¶ 2(a)(2) and 2(c)(2) and (3), App. 3-4.

to order reimbursement and compensation and the obligation to ensure that the amounts are reasonable."

Against this background, one precept emerges with clarity. Appellate review of assessments made by an MDL judge is most assuredly the function of the court of appeals that exercises jurisdiction over the MDL court. The decision of the court below, relegating those who opt out of a class settlement to the possibility of obtaining review of an MDL assessment at a distant time and in a foreign forum, suggests a remedy that is in practical effect illusory.

The issue posed by the instant case – whether petitioners have been effectively denied their right to appellate review – is both substantial and of broad significance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 26, 1999

APPENDIX

Orders of the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

IN RE: SILICONE GEL BREAST IMPLANTS PRODUCT LIABILITY LITIGATION (MDL-926)

Order No. 30, dated March 26, 1966 provides in relevant part:

8. **Common Benefit Fund.** Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 27, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right.

Order No. 13, dated July 23, 1993, provides:

This order is entered in order to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.

1. Plaintiffs' Litigation Expense Fund to be Established. Plaintiffs' National Liaison Counsel – Francis H. Hare, Jr., and J. Michael Rediker – are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. They may designate an escrow agent for this purpose. Those funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of those funds except to the extent of amounts directed to be disbursed to such person under this order. These funds will not constitute the separate property of any party or attorney or – except when and as directed to be disbursed as provided in this order to a specific person – be subject to garnishment or attachment for the debts of any party or attorney. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Assessment.

(a) All plaintiffs and their attorneys who, after this date, either agree – for a monetary consideration – to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including both compensatory and punitive damages, with respect to a breast implant claim are hereby assessed:

(1) 5% of the "gross monetary recovery," if the agreement is made or the judgment is entered after this date and before November 1, 1993, or

(2) 6% of the "gross monetary recovery," if the agreement is made or the judgment is entered after October 31, 1993.

Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment. If for any reason the assessment is not so withheld, the plaintiff and her counsel are jointly responsible for paying the assessment into the fund promptly upon receipt.

(b) In measuring the "gross monetary recovery":

(1) Exclude any amounts taxed, or potentially subject to be taxed, as court costs that are to be paid by the defendant.

(2) Exclude any payments to be made by the defendant directly to unrelated third-parties, such as to physicians, hospitals, and other health-care providers.

(3) Exclude the value of any services or products that are to be provided by the defendant without charge, or at reduced charges, such [as] those relating to removal or replacement of implants.

(4) Include the present value of any fixed and certain payments to be made in the future (except that, in lieu thereof, a plaintiff may agree to be assessed the appropriate percentage when and as future payments are received).

(c) This obligation:

(1) Applies to all cases now pending, or later filed transferred to, or removed to, this court and treated as part of the coordinated proceeding known as the Silicone Gel Breast Implants Products Liability

Litigation, including cases later remanded to a state court as a result of permitting an amendment adding a non-diverse party (but not including, however, those cases remanded to a state court on the basis that removal was improper).

(2) Applies to other federal breast-implant cases which are not transferred to this court under MDL-926 but in which plaintiff's counsel agrees to this obligation. (It is expected that, in due course, after coordinated MDL pretrial proceedings have been completed in this court and cases are being remanded back to transferor courts for further proceedings, counsel in newly filed and removed cases may agree to the terms of certain orders in this court in lieu of transfer under § 1407.)

(3) Applies to cases in a state court to the extent so ordered by the presiding judge of that court.

(d) If the plaintiff's attorney has a contingent fee agreement with the client, the amount to be paid to the fund shall be charged against, and paid from, the attorney's share of the recovery, except that, if the agreement contains special provisions regarding reimbursement for litigation expenses, one-half of that amount – unless a different portion is stated in the court's approval of disbursement – may be treated in like manner as for other litigation expenses.

(e) Plaintiffs and defendants, and their counsel, are jointly responsible for promptly reporting to Plaintiffs' National Liaison Counsel – or to the escrow agent designated by them – the terms of any settlement or judgment that may be subject to this order. This report is to enable monitoring of compliance with this order. If so provided in a settlement agreement, the terms shall – unless and

until so ordered by this court – be kept confidential and not be communicated by them to other litigants and their attorneys.

(f) Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances.

3. Disbursements.

(a) Payments may be made from the fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. Attorneys eligible are not limited to Plaintiffs' National Liaison Counsel and members of Plaintiffs' National Steering Committee, but include, for example, other attorneys called upon by them to assist in performing their responsibilities, State Liaison Counsel, and other attorneys performing similar responsibilities in state court actions in which the presiding state court judge has imposed similar obligations upon plaintiffs to contribute to the fund.

(b) Payments will be allowed only to compensate for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs.

(1) Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and paying for hard-copies or computerized images of documents from the defendants; to conducting "national" or "state" depositions; and to activities connected with the coordination of federal and state litigation, such as

assessments to pay for the services of the special master appointed by the court for that purpose. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.

(2) Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses. No "bonus" is to be paid merely because the service or expense is undertaken for the common benefit of other litigants.

(c) No amounts will be disbursed without review and approval by a committee of federal and state judicial officers to be designated by the court. The committee may, however, utilize the services of a special master to assist in this review, and may authorize one or more of its members to act for the committee in approving particular types of applications for disbursement.

(d) If the fund exceeds the amount needed to make payments as provided in this order, the court will order an [sic] refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.

4. Modification. The court reserves the power to modify the terms of this order, but no changes imposing any additional burden or obligation on plaintiffs in actions in a state court that has imposed this obligation on such parties will be made without the approval of the presiding state court judge.

Order No. 27, dated December 22, 1995, alerts settling defendants and opt-out claimants to the provisions of Order No. 13 and paragraph 28(b) of an attached notice. That paragraph states:

> Order No. 13 continues in place, and will continue to govern the resolution, whether by trial or settlement, of breast-implant claims of persons who do not accept (or are not eligible to participate in) the revised settlement, but who either were members of the *Lindsey* class (and did not exercise their initial right to opt out) or, although not members of the Lindsey class (whether because they were ineligible or because they exercised their initial right to opt out) now or in the future have breast-implant claims that are filed in or properly removed to federal court. What this means is that 6% of the "gross monetary recovery" obtained by such persons, whether by trial or settlement, is to be withheld and paid into the common-benefit expense fund.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6508

IN RE: SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION (MDL-926)

HEIDI LINDSEY, et al.,

Plaintiffs,

CAROL INGLE,
BARBARA BRENNAN,

Plaintiffs-Appellants,

versus

DOW CORNING CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed Dec. 4, 1998)

ON PETITITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____ F. 2d _____).

Before: HATCHETT, Chief Judge, DUBINA, Circuit Judge, and KEITH*, Senior Circuit Judge.

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* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6508

D. C. Docket No. 92-P-10000-S

CAROL INGLE,
BARBARA BRENNAN,

Plaintiffs-Appellants,

versus

DOW CORNING CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(October 6, 1998)

Before HATCHETT, Chief Judge, DUBINA, Circuit Judge, and KEITH*, Senior Circuit Judge.

PER CURIAM:

We dismiss this appeal because the district court's Order No. 30 is not a final appealable order.

APPEAL DISMISSED.

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* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.